

# **EXHIBIT 12**

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STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW  
HEMLOCK SEMICONDUCTOR CORPORATION,  
Plaintiff,  
vs. File No. 13-020593-CK-1  
GREEN ENERGY TECHNOLOGY,  
Defendant.

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ORAL OPINION OF THE COURT  
BEFORE THE HONORABLE FRED L. BORCHARD, CIRCUIT JUDGE  
Saginaw, Michigan - April 20, 2015

APPEARANCES VIA PHONE:

For Plaintiff: (There was no appearance stated on the record.)

For Defendant: (There was no appearance stated on the record.)

Reported By: TRACY M. STEMLER, CSR-4023  
Official Court Reporter

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I N D E X

WITNESSES: PLAINTIFF

None

WITNESSES: DEFENDANT

None

EXHIBITS:

MARKED RCVD

None

1           Saginaw, Michigan

2           April 20, 2015

3                   (Following took place via phone:)

4           THE COURT: If, at any time, you cannot.

5           Hear me, please let me know. Court at this  
6 time will call the matter of Hemlock Semiconductor  
7 versus Green Energy, Case Number 13-020593-CK. The  
8 record will reflect this is the day, time, and place  
9 set for an opinion on Defendants' motion for compelling  
10 discovery.

11                   Background on this case indicates the  
12 defendants, Green Energy Technology, Inc., otherwise  
13 known as GET, and Tatung Company of America, Inc.,  
14 Tatung having filed a joint motion to compel discovery  
15 asserting that, notwithstanding objections by the  
16 plaintiff, Hemlock Semiconductor, HSC, certain  
17 requested information is relevant and it should be  
18 provided in the discovery.

19                   To put the present issue in context, review  
20 of the pleadings and undisputed facts is helpful in  
21 this matter. Hemlock Semiconductor's complaint alleges  
22 that pursuant to a long-term supply amendment dated  
23 5-4-11 as subsequently amended, the agreement, which  
24 will be known as -- between HSC's assignor, its  
25 affiliate, Hemlock Singapore, and both defendants, HSC,

1 was to manufacture and sell certain polycrystalline  
2 silicon, known as the product, to the defendants in  
3 specified quantities pursuant to an annual schedule at  
4 specific prices for a term extending through December  
5 31 of 2020.

6 The agreement obligated the defendants to,  
7 quote, absolutely and irrevocably to pay full purchase  
8 price for the product regardless of whether Defendants  
9 actually took delivery, that is, quote, take and pay,  
10 end quote, contract. Complaint goes on to allege the  
11 agreement required Defendants to make advance payment  
12 in several installments.

13 It also provided that upon an uncured  
14 default, HSC could terminate the agreement and recover  
15 all unpaid advance payment installments, retain any  
16 advanced payment, recover for all delivered product,  
17 and recover payment for all remaining product at the  
18 then effective price.

19 It's alleged the defendants failed to pay  
20 advance payment installments as required and failed to  
21 take and/or pay for product. HSC also alleges it sent  
22 notice of termination to the defendants pursuant to the  
23 agreement and it claims \$737,235,429.17 due on the  
24 agreement under theories of breach of contract and  
25 account stated.

1                   While GET's Answer admits signing the  
2                   agreement including the amendments, Tatung's Answer  
3                   admits signing the amendments to the agreement, and it  
4                   was originally with the defendant; that is, the  
5                   agreement was originally with the defendant Green  
6                   Energy only, and responses to the requests for  
7                   admission, when review of the pleadings, also noted  
8                   advance payment installments by admission were not  
9                   made. The agreement does contain take-or-pay language.  
10                  The agreement contains the liquidated damages  
11                  provision.

12                 Defendants received notice of default from  
13                 HSC. Both defendants, however, interpose several  
14                 affirmative defenses, including failure to mitigate  
15                 damages. Performance, as argued, was excused by the  
16                 Doctrine of Commercial Impracticability, and  
17                 performance was also excused by the Doctrine of  
18                 Frustration of Purpose.

19                 It's also alleged affirmatively the requested  
20                 damages were unreasonable, excessive and unenforceable,  
21                 and acted as unenforceable penalty. Now, because of  
22                 these defenses, the defense assert that, over HCS's  
23                 (sic) objections, they are entitled to discovery  
24                 evidence related to Hemlock's financial performance and  
25                 condition before and after execution of the agreement,

1 including income statements, balance sheets, sales  
2 revenue information concerning product inventory, and  
3 HSC's strategic planning and utilization forecasts on  
4 the premises, it's argued, that the information will  
5 demonstrate that HSC's actual damages render the  
6 liquidated damages provision of the agreement  
7 unenforceable and unreasonable.

8 It's also argued that HSC's agreement to sell  
9 product to other customers is relevant on the premises  
10 that HSC agreed to sell product at reduced market rates  
11 to other customers in recognition of the global decline  
12 in the solar industry and failed to mitigate damages by  
13 similarly selling to Defendants at attractive prices  
14 below the -- that required by the agreement.

15 It's finally argued, also, that HSC's  
16 awareness of market, legal, and government forces  
17 affecting the market make the request for discovery  
18 reasonable on the premises that this information will  
19 relevantly show the frustration of purpose of the  
20 agreement, impossibility of it, and commercial  
21 impracticability.

22 As to liquidated damages central to this  
23 present motion, and, really, as the Court looks at it,  
24 the entire case, is the enforceability of the  
25 agreement's liquidated damages provision. Liquidated

1 damages, this Court understands, refers to the sum  
2 which the parties to a contract have agreed at the time  
3 of entering into the contract as being payable to  
4 satisfy any loss or injury flowing from the breach of  
5 contract. This principle's set forth in 7 Mich Civ  
6 Jur, Damages Section 146.

7 To be enforceable, the liquidated damages  
8 clause must bear a reasonable relation to the  
9 anticipated or actual damages. This principle is set  
10 forth in St. Paul Fire and Marine Insurance Company  
11 verses Guardian Alarm, 115 Mich App 278, 1982. If  
12 damages are deemed excessively harsh, too large an  
13 amount, that is, unreasonable, they could be considered  
14 punitive rather than compensatory and therefore  
15 unenforceable. This involves -- or is -- Court, for  
16 that principle, would cite the case of Watson versus  
17 Harrison, 324 Mich 16. It's a 1949 case.

18 The validity and reasonableness of a  
19 liquidated damages provision is determined by  
20 conditions existing at the time the contract is entered  
21 into, not when the breach occurs, Wilkinson versus  
22 Lanterman, 314 Mich 568, a 1946 case, and there's other  
23 cases since that time.

24 There are three factors in determining  
25 reasonableness of liquidated -- of the liquidated



1 damages provision in sale of goods: One, the  
2 anticipated or actual harm caused by the breach; two,  
3 the difficulty of proving damages sustained; and,  
4 three, the inconvenience or nonfeasibility of otherwise  
5 obtaining an adequate remedy, MCL 440.24718(1) and UCC  
6 2-718(1).

7 As to the anticipated actual harm factor,  
8 although courts are prone to honor a general freedom of  
9 contract including allocation of risk, parties cannot  
10 disregard the principle of just compensation that  
11 contemplates compensation only for damages actually  
12 sustained, Curran, C-U-R-R-A-N, versus William, 352  
13 Mich 278, a 1956 case, but an agreement for damages  
14 will not be disregarded as an unforcible --  
15 unenforceable penalty unless it is obvious from the  
16 contract and the whole subject matter that the  
17 principle compensation has been disregarded, Central  
18 Trust Company versus Wolf, 255 Mich 8, 1931.

19 Before accepting as conclusive an agreement  
20 as to damages, it should be examined by the Court to  
21 determine whether the liquidated damages figure is  
22 really in the nature of an attempted compensation of  
23 actual damages likely to result or whether it has the  
24 effect of exacting the penalty from the contract  
25 breaker.

1           As to the difficulty of proof, liquidated  
2 damages will be permitted only if actual damages cannot  
3 be ascertained with certainty at the time of  
4 contracting, Worley, W-O-R-L-E-Y, versus McCarty, 354  
5 Mich 599, 1958 case.

6           As to the inconvenience or nonfeasibility of  
7 an adequate remedy, this seems to be substantially  
8 redundant to the previous factor that damages not be  
9 readily measurable at the time of contracting. Again,  
10 this is Trentacosta, Michigan Contract Law, 2d ed,  
11 Section 6.36, page 260.

12           Importantly, the enforceability of liquidated  
13 damages provisions in Michigan is a question of law,  
14 Moore versus St. Clair County, 120 Mich App 355.

15           Here, the defendants seek to discover HSC's  
16 financial condition since 2006, that is, before and  
17 after the execution of the agreement in 2011, on the  
18 premise the information will demonstrate HSC's actual  
19 damages render the agreement's liquidated damages  
20 provision unenforceable and unreasonable.

21           While evidence related to HSC's actual and  
22 anticipated damages may be relevant and discoverable  
23 and this very information may be necessary to enable  
24 the Court to determine reasonable -- the reasonableness  
25 of the liquidated damages provision only, the relevance

1 of the defendants' particular discovery request is  
2 suspect for several reasons:

3 First, the defense argues in their supporting  
4 brief at page four their obligation to pay is  
5 conditioned on HSC's ability to provide product and,  
6 therefore, they want to discover whether HSC was even  
7 financially viable or capable of performing its  
8 contractual obligations, but nowhere is it claimed,  
9 either in the defendants' answers, affirmative  
10 defenses, or otherwise, that HSC is guilty of a  
11 material breach or even an anticipatory breach of the  
12 agreement. Rather, the defendants' argument is limited  
13 to the anecdotal observation that the entire solar  
14 industry suffered a drastic decline beginning in 2011,  
15 and Hemlock no longer -- excuse me, Hemlock, no doubt,  
16 faced the very similar difficulties as other  
17 participants in the market.

18 Second, the defendants seek information  
19 concerning HSC's financial condition before and after  
20 the execution of the agreement, but case law indicates  
21 that the reasonableness of liquidated damages is to be  
22 determined by conditions existing at the time the  
23 contract is entered into. That's the Wilkerson case.

24 Third, even if limited to HSC's financial  
25 condition as the agreement's function are the discovery

1 requests relevant to the inquiry whether the parties'  
2 calculation of liquidated damages bears a reasonable  
3 relation to HSC's actual damages anticipated at the  
4 time? This requires consideration of the proper  
5 measure of damages in the absence of a liquidated  
6 damages agreement.

7 In this regard, the UCC, at 2-708(1), and MCL  
8 440.2708(1) provides, in pertinent part: Subject to  
9 Subsection (2) and the provisions of this article with  
10 respect to proof of market price, Section 2723, the  
11 measure of damages for nonacceptance or repudiation by  
12 the buyer is the difference between the market price at  
13 the time and place for tender and the unpaid contract  
14 price together with any incidental damages provided in  
15 this article, Section 2710, but less expenses saved the  
16 consequence of the buyer's breach. The contract price  
17 is the agreement, and the market price does not appear  
18 to function -- does not appear a function of HSC's  
19 financial condition.

20 Finally, take-or-pay contracts have received  
21 judicial acceptance elsewhere, including Hemlock  
22 Semiconductor versus Global Sun Limited, which  
23 provides, in part, the purpose of the take-or-pay  
24 clause is to appropriate the risk of production and the  
25 sales between the buyer and seller. The seller bears

1 the risk of production. To compensate seller that  
2 risk, buyer agrees to take or pay for it -- pay for, if  
3 not taken, a minimum quantity. The buyer bears the  
4 risk of market demand. The take-or-pay clause insures  
5 that if the demand for product goes down, the seller  
6 will still receive the price for the contract quantity  
7 delivered each year.

8 Under Universal RES Corporation versus  
9 Panhandle, 813 F2d 77, at page 80, the terms of a  
10 take-or-pay clause are fully enforceable. The Tenth  
11 Circuit has emphasized when considering contracts with  
12 take-or-pay provisions where the buyer is in breach,  
13 the seller's damages are measured by the obligation to  
14 pay, the value of which is the contract price in effect  
15 at the time such deficiency occurred multiplied by the  
16 difference between the contract quantity and the actual  
17 quantity of the product purchased for any year buyer  
18 was in breach.

19 This principle is also set forth in Prenaulta  
20 Corporation versus Colorado Interstate, 944 F2d 677, at  
21 page 690. The Court would also note in direct -- or in  
22 the opinion, the matter of Attorney General versus  
23 Public Service Commission, a Court of Appeals' decision  
24 found at 171 Mich App 696, a 1988 case.

25 In conclusion, the particular discovery

1 request related to HSC's financial condition does not  
2 appear to be relevant to the affirmative defense that  
3 the liquidated damages provision of the agreement  
4 constitutes an unreasonable or unenforceable penalty.

5 As to mitigation of damages, as part of the  
6 broader principle of avoidance of consequences, the law  
7 imposes a duty on a party injured by a breach of  
8 contract to undertake reasonable efforts to minimize  
9 resulting damages, Shiffer, S-H-I-F-F-E-R, versus Board  
10 of Education, 393 Mich 190, at page 197, a 1974 case,  
11 and there are a number of other cases also cited  
12 subsequent and as well as prior to that case, but only  
13 reasonable diligence and ordinary care is required to  
14 allow full recovery of damages caused by a defendant's  
15 wrong, Clapman, C-L-A-P-M-A-N, versus Yanga, Y-A-N-G-A,  
16 102 Mich App 47, a 1980 case, not necessarily the best  
17 court cause of action or even -- or achieve a measure  
18 of success. See-- GC Kay Company versus Standard Steel  
19 Treating, 352 Mich 234.

20 Mitigation commonly consists of a seller  
21 taking steps to reduce expenses or generating revenue  
22 by selling goods otherwise destined to the defaulting  
23 buyer.

24 The merit of this issue is arguably inverse  
25 to the enforceability of the liquidated damages

1 provisions; that is, any mitigation duty would be  
2 seemingly displaced if the parties' contractual  
3 obligation for damages is reasonable.

4 Here, assuming applicability of the defense,  
5 the defendants argue in their supporting brief, page  
6 six, that the duty to mitigate required HSC to allow  
7 Defendants to continue purchasing product from HSC even  
8 after the unforeseen and precipitous decline of prices  
9 in the solar industry beginning in 2011. Because  
10 product is a fungible commodity, HSC's costs of  
11 producing the product are identical across customers is  
12 clearly indicative of whether it could have accepted  
13 lower prices from the defendants.

14 Had HSC allowed such a concession, the  
15 defendants argue that other -- as other suppliers did,  
16 Defendants could have continued to purchase product  
17 from HSC, and HSC could have continued to generate  
18 revenue from Defendants even if something less than the  
19 windfall that HSC seeks through the lawsuit as, Court  
20 again reiterates, Defendants argue in their brief at  
21 page six.

22 It seems an interesting proposition that a  
23 party's duty to mitigate extends to selling goods under  
24 contract to that of a breaching party for less than the  
25 contract price, and, in any event, this proposition

1 would not appear to mitigate the defendants' exposure;  
2 that is, selling the product at a reduced price would  
3 end up with the defendants paying the amount and still  
4 being liable for the deficiency due under the agreement  
5 rather than mitigating by HSC's generating revenue from  
6 sale to a third-party buyer and pursuing Defendants on  
7 the deficiency only.

8 Here, rather than discount the defendants'  
9 contract price to reflect the changing market  
10 conditions, HSC elected to affirm the agreement and to  
11 sue for damages, Price versus Long Realty, Inc., 199  
12 Mich App 461, at page 466. Accordingly, assuming HSC's  
13 obligation to mitigation damages not extend to selling  
14 product to the defendants at a price discounted from  
15 the agreement, the defendants' request for information  
16 related to HSC's agreements to sell product to other  
17 customers is based on a false premise.

18 As to frustration of purpose, commercial  
19 impracticability and impossibility, the defendants have  
20 also interposed the affirmative defenses. Although  
21 impossibility was not enumerated as an affirmative  
22 defense by either of the defendants, its applicability  
23 is asserted in the present joint motion/brief, and the  
24 Plaintiffs -- the Plaintiff has joined in the issue in  
25 its response. In any event, the restatement of



1 contracts equates extreme impracticability with  
2 impossibility.

3 Although contracting parties are generally  
4 obligated to perform or pay damages for failure to  
5 perform no matter how burdensome the performance, the  
6 law excuses promisors from performing when an  
7 unforeseen event makes performance impossible, Dobbs,  
8 under Laws of Contract, Section 186, page 296.

9 Impossibility as a defense is recognized in  
10 two forms: Original impossibility; that is, unknown  
11 circumstances exist when the contract is formed that  
12 render performance impossible, and supervening  
13 impossibility; that is, occurrence of an event after  
14 the contract -- I'm sorry, that is, the occurrence of  
15 an event after contract formation renders performance  
16 impossible.

17 In either event, the key to excusing  
18 nonperformance is due to impossibility -- due to  
19 impossibility is the foreseeability of the  
20 circumstances rendering performance impossible.  
21 Trentacosta, Michigan Contract Law, 2d ed, Section  
22 9.65, at page 397. Where there is conflicting evidence  
23 on the question of impossibility, it is a question of  
24 fact for the trier of fact to resolve, Roberts versus  
25 Farmers, Inc., Exchange, 275 Mich at 58, page 74.

1           The affirmative defense of impracticability  
2       derives from the restatement of contracts recognition  
3       that absolute impossibility is not required, but an  
4       obligor may be excused from performance upon a showing  
5       of impracticability because of extreme and unreasonable  
6       difficulty, expense, injury, or loss involved, Bissell  
7       versus LW Edison Company, 9 Mich App 276, at page 285.  
8

9           The doctrine of frustration of purpose may be  
10      invoked to excuse performance if, one, the contract is  
11      at least partially executory, two, the purpose of the  
12      contract was known to both parties at the time of  
13      frustration, and, three, the purpose was frustrated by  
14      an event which is not the fault of the party invoking  
15      the doctrine not reasonably foreseeable, in other  
16      words, at the time of the formation, Molnar versus  
17      Molnar, 110 Mich App, page 622.

18          However, here, the affirmative defenses of  
19      frustration of purpose, impossibility, and  
20      impracticability are premised on the collapse of the  
21      product's market. As analyzed in Dobbs under Laws of  
22      Contract, Section 197, page 215, this premise appears  
23      legally deficient.

24          For impossibility of frustration to operate  
25      as an excuse, it must be objective rather than

1 subjective. It is the difference between the thing  
2 that cannot be done and I cannot do it.

3 The primary application of this distinction,  
4 Dobbs goes on to note, is in cases where performance is  
5 impossible because of inability to pay money or render  
6 any other performance as a result of insolvency or  
7 other financial problems. Such inability is personal  
8 to the obligor. It does not excuse performance. It  
9 is, perhaps, more realistic to state, however, that  
10 when entering into a contract, each party assumes the  
11 risk that he will have the financial ability to  
12 perform, and cases cited by the plaintiff confirm that  
13 economic hardship does not excuse performance. That  
14 includes the case of General Motors Corp. versus  
15 Paramount Metal Products, 90 F Supp 2d 861, Karl Wendt  
16 Farm Equipment Company versus International Harvester,  
17 931 F2d 1112, Chainworks, Inc., versus Webco  
18 Industries, 2000 -- that's cited in 2000 -- or a 2006  
19 case.

20 And, accordingly, the defendants', the court  
21 would note, discovery request as related to HSC's  
22 awareness of market, legal, and government forces  
23 affecting the product marketplace do not appear to be  
24 relevant to an appropriate application of the  
25 affirmative defense of impracticability, impossibility,

1 and frustration of purpose. Therefore, it is ordered  
2 that the defendants' motion to compel discovery is  
3 denied.

4 That is the opinion of the Court. I'd ask  
5 that the appropriate order be entered, and if you can  
6 submit it within seven days or get it sent out under a  
7 seven-day notice of presentment, I'd appreciate it.  
8 Thank you.

9 A VOICE: Thank you, your Honor.

10 (Proceedings adjourned.)  
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1 STATE OF MICHIGAN )

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3 COUNTY OF SAGINAW )

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I certify that this transcript is a complete, true  
and correct transcript of the proceedings and testimony  
taken in this case before the Honorable Fred L. Borchard,  
Circuit Judge, in Saginaw, Michigan.

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Tracy M. Stemler, CSR-4023  
Official Court Reporter  
111 South Michigan Avenue  
Saginaw, MI 48602

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102 [1] 13/16	58 [1] 16/25	also [11] 4/13 4/21 5/7 5/17 5/19	also [11] 4/13 4/21 5/7 5/17 5/19
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111 [1] 20/18	<b>6</b>	amended [1] 3/23	amendment [1] 3/22
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120 [1] 9/14	677 [1] 12/20	and/or [1] 4/21	anecdotal [1] 10/13
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171 [1] 12/24	718 [1] 8/6	14/1 14/25 15/25 18/6	App [7] 7/11 9/14 12/24 13/16
186 [1] 16/8	74 [1] 16/25	15/12 17/7 17/17	App 461 [1] 15/12
190 [1] 13/10	77 [1] 12/9	Appels' [1] 12/23	appear [5] 11/17 11/18 13/2 15/1
1931 [1] 8/18	<b>8</b>	18/23	appearance [2] 1/17 1/21
1946 [1] 7/22	80 [1] 12/9	APPEARANCES [1] 1/15	appears [1] 17/22
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1956 [1] 8/13	861 [1] 18/15	appreciate [1] 19/7	appropriate [3] 11/24 18/24 19/5
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197 [2] 13/10 17/22	9.65 [1] 16/22	12/10 12/13 13/11 14/11 16/3 17/20	arguably [1] 13/24
1974 [1] 13/10	90 [1] 18/15	argue [3] 14/5 14/15 14/20	argued [4] 5/15 6/4 6/8 6/15
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1982 [1] 7/11	944 [1] 12/20	article [2] 11/9 11/15	as [31]
1988 [1] 12/24	<b>A</b>	ascertained [1] 9/3	ask [1] 19/4
199 [1] 15/11	ability [2] 10/5 18/11	assert [1] 5/22	asserted [1] 15/23
<b>2</b>	absence [1] 11/5	asserting [1] 3/15	assignor [1] 3/24
2-708 [1] 11/7	absolute [1] 17/3	assumes [1] 18/10	assuming [2] 14/4 15/12
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2000 [2] 18/18 18/18	accepted [1] 14/12	Avenue [1] 20/18	avoidance [1] 13/6
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2011 [3] 9/17 10/14 14/9	accordingly [2] 15/12 18/20	Background [1] 3/11	balance [1] 6/1
2015 [2] 1/13 3/2	account [1] 4/25	based [1] 15/17	be [21]
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215 [1] 17/22	across [1] 14/11	because [4] 5/21 14/9 17/5 18/5	been [1] 8/17
234 [1] 13/19	acted [1] 5/21	before [6] 1/12 5/25 8/19 9/16	
255 [1] 8/18	action [1] 13/17		
260 [1] 9/11	actual [10] 6/5 7/9 8/2 8/7 8/23 9/2		
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275 [1] 16/25	adequate [2] 8/5 9/7		
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278 [2] 7/11 8/13	admission [2] 5/7 5/8		
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